IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Trade Tax Revision No. 133 or 2001
M/S Polyplex Corporation Limited .…….Revisionist.
Vs.
Commissioner of Trade Tax Dehradun …….Respondent.

AND

Trade Tax Revision No. 134 of 2001
(Old No. 1145/1998)
M/S Polyplex Corporation Limited .…….Revisionist.
Vs.
Commissioner of Trade Tax Dehradun …….Respondent.

Hon'ble M.M. Ghildiyal, J.

These Trade Tax revisions for the assessment years 1992-93 and 1993-94 arises out of penalty proceedings u/s 15-A(1) (O) of U.P. Trade Tax Act. Since both the revisions are against common order passed by Trade Tribunal, both the revisions are being decided by common judgment.

Heard Sri Bharat Ji Aggarwal Senior Counsel assisted by Sri S.K. Posty learned counsel for the revisionist and learned Additional Chief Standing Counsel State of Uttaranchal for respondent.

Brief facts of the case are that the revisionists M/s Polyplex Corporation Limited is a public limited company incorporated under Indian Companies Act, 1956. Its registered office is situated at Lohiya Head Road Khatima District Udham Singh Nagar having its head office in New Delhi and a Go-down at Noida, The company is registered under U.P. Trade Tax Act as well as Central Sales Tax Act and the applicant has been granted illegibility certificate under section 4-A of U.P. Trade Tax Act.

The applicant is carrying on the business of manufacture and sale of Polyester Films within India as well as outside the country in view of the policy of Government of India, the Company was permitted to import certain items under custom duty free scheme under advance licence. The applicant imported certain polyester films from the foreign countries, the entries of which are duly made

in the records of the custom department and also in the record maintained by the company at New Delhi as well as in Noida.

One consignment of the film imported from outside India was coming from Delhi Custom Bounded Warehouse and was proceeding to Noida Go-down, which was checked by the Trade Tax Officer Mobile Squad on 31-12-93 and was seized on the ground that Form-31 under section 28-A of the Act was not available along with the consignment. However, the said goods were released on furnishing of cash security Rs. 1,29,076-00 and on furnishing of bank guarantee of Rs. 1,30,000-00.

This seizure of 31-12-93 has given raise to the penalty proceedings for the assessment year 1993-94 under section 15-A (1) (O) in which the Assessing Authority has imposed a penalty of Rs. 14,74,700-00.

For the assessment year 1991-92 an assessment order was passed by the Assessing Authority on 25-1-96 and in the assessment proceedings it was found that the company has recorded in its account books the import of polyester films of Rs. 41.78, 141-60 which is duly recorded in the account books and on which the tax has also been deposited but for bringing these goods Form – 31 was not used, as required under section 28-A. Accordingly a penalty order under section 15-A (1) (O) for the alleged violation of section 28-A was also passed separately on 25-1-1996 imposing a sum of Rs. 13,76,150-00 as penalty.

The penalty was imposed on the basis of transactions, already recorded in the account books for the assessment year 1992-93 in which it was found that the goods imported are duly recorded in the account books but these goods have been brought without Form-31. Hence there is a technical violation of section 28-A.

Against the aforesaid order of the Trade Tax Officer, Khatima dated 25-1-1996, for the assessment year 1992-93 and the order dated 6-11-1995 for the assessment year 1993 – 94 imposing

penalty under section 15-A (1)(O) appeals were filed before the Deputy Commissioner (Appeals), Trade Tax, Haldwani. The Deputy Commissioner (Appeals) by a common order dated 5-9-1997 has dismissed the appeal.

The company filed second appeal under section 10 before the Trade Tax Tribunal, Haldwani, Bench Haldwani. The Trade Tax Tribunal by order dated 5-6-1998 has partly allowed the appeals, both for the assessment years 1992-93 and 1993-94 and have reduced the penalty amount for both the years, after recording a finding of fact that the goods imported are duly recorded in the records and they are also entered in the custom documents on which the tax has also been paid along with the interest. Hence there is no loss of revenue to the Trade Tax Department.

Against the aforesaid order of the Tribunal, the company has filed these two revision challenging the confirmation of penalty. Learned counsel for the revisionists has submitted that during the assessment year 1992-93 in the assessment proceedings it was found that the company has imported polyester films from out side the country worth Rs. 41,78,141-60 which is duly recorded in the account books of the company, which was verified by the Assessing Authority and this fact was also mentioned in the assessment order passed for the assessment year 1992-93. He has further submitted that no penalty can be legally imposed merely because these goods were brought to Noida without furnishing Form – 31 though in the assessment proceedings it was found that the applicant has imported polyester films from the foreign countries which was disclosed by the company itself and was duly entered in the account books of the company and on which the tax has already been deposited by the company on its sales made by it. He has placed reliance in the case of Gulmarg Chemicals and Scientific Works, Aligarh Vs. Commissioner of Sales Tax, U.P. reported in 1996, U.P. Tax Cases, page 973. In the case of Gulmarg Chemicals (supra), the purchases of Rs. 3,09,832.90 were found

duly recorded in the account books, which was verified and due tax was paid but it was found that Form –31 was not furnished for the purchases of these goods, which was brought from out side. Hence the penalty was imposed by the Assessing Authority and was confirmed up to the Tribunal level. The High Court in para-13 has held as under:-

"In view of the admitted facts of the case and the clear finding of facts recorded by the Assessing Authority failure to furnish Form No. 31-A for the purchase made from outside U.P. By post was merely a technical commission caused by lack of knowledge or negligence but not with an intention to evade tax as the assessee had already recorded all the purchase in his account books which were dely verified and the tax thereon has been deposited by the assessee. I, therefore, hold that in view of the facts and circumstance of the present case the imposition of penalty under section 28-A reads with section 15-A (1)(O) of the U.P. Sales Tax Act was not justified in law and on facts. Consequently the imposition of penalty by the Assessing Authority and the confirmation thereof by the appellate authorities is liable to be quashed."

He has further placed reliance in the case of Commissioner of Sales Tax, U.P. versus Oriental Carbon Limited reported in 1997 N.T.N (Volume-10) page 105 in which the Apex Court has held that finding of fact reached by the Tribunal that there had been no intention to cause any loss to the revenue or to evade tax in importing into State certain consignment without Form-31 the imposition of penalty on the ground of breach of provision of section 28-A was not good.

In the present case also the Tribunal has recorded a categorical finding that no loss has been caused by the applicant-company since the entire transaction is duly recorded in the account-books on which tax has also been paid as such neither there was intention of the company to evade tax not there was any loss of

revenue to the department and as such the Tribunal was not correct in confirming the imposition of penalty.

In the case of Mewa Lal and Sons Vs. Commissioner of Sales Tax reported in 2002 U.P. Tax Cases page-165 the Court has held a finding has to be recorded by the authorities concerned that the goods were being transported in an attempt to evade assessment or payment of tax due or likely to be due under the Act. Unless such a finding is recorded no penalty can be imposed.

In the present case on the contrary there is a finding in favour of the company that there was no intention to cause any loss to the revenue and the entire purchases are duly recorded in the account-books and duly supported by the customs documents.

In the case of Hindustan Steel Limited Vs. State of Orissa reported in 25 S.T.C. page-211 has held as under:-

'An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute.'

For the assessment year 1993-94 at the time of seizure of goods by the Trade Tax Officer all the documents except Form-31 were there. The consignment was admittedly coming from Delhi Custom Bounded Warehouse and was proceeding to company's

Go-down which is situated at Noida. Details of the consignment was verified by the Customs Department New Delhi and was duly recorded in the custom's record and the company has deposited the tax.

The Trade Tax Tribunal being last fact finding authority has categorically recorded a finding that the department has not suffered any loss of revenue since the entire tax has been deposited along with the interest. For the delay in depositing the tax and the entries of these goods have been duly made in the custom documents including in the records maintained at Delhi for its movement from Delhi to Noida. From –31 as required under section 28-A was not available at the time of seizure but other documents were available and the entire payment was made through bank in advance.

> **'Section 28-A** (1) Any person (hereinafter in this section referred to as the importer) who intends to bring, import or otherwise receive, into the State from any place without the State, any goods other than the goods exempt under clause (a) of Section 4 in such quantity or measure or of such value as exceeds,
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> (a) …….
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> (b) the quantity, measure or value notified by the State Government in that behalf, in connection with business, shall obtain the prescribed from of declaration on payment of the prescribed fee from the assessing authority having jurisdiction over the area where his principal place of business is situated or, in case there is no such place, where he ordinarily resides:
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> (2) (a) the importer shall furnish to the consignor the declaration in the prescribed from in duplicate duly filled in and signed by him and the driver or any other person-in-charge of any vehicle carrying any such goods shall carry with him the copies of declaration duly verified by the consignor in the prescribed manner together with such other documents as may be prescribed and shall before crossing any check-post or barrier established under section 28, deliver one copy of the such declaration to the Officer-in-charge of such check post or barrier and the other copy of the declaration and the remaining documents along with the goods to the importer or his agent,

Rule 83(4)-

(a) The owner, driver or any other person-in-charge of the vehicle or vessel shall, in respect of such goods carried in the vehicle or vessel as are notified under or referred in such-section (1) of section 28-A and as exceed the quantity, carry with him the following documents:-

(i) Form of declaration for import or certificate in Form XXXII, hereinafter in the rules in this chapter referred to as declaration or certificate, as the case may be, in duplicate;

(ii) Cash memo, bill or challan,

(iii) Authorization for transfer of goods/goods challan hereinafter referred to as trip sheet in triplicate.'

Learned counsel for the applicant has placed reliance of the division Bench judgment of Allahabad High Court in the case of Jain Suth Vanaspati Vs. State of U.P. reported in 1983 U.P.T.C. page – 198 wherein the Court has held as under:-

'Power to detain the goods and levy penalty in respect thereof can not be exercised for the reason that the said goods were not accompanied by the requisite documents. This power can be exercised , if the goods detained or not accompanied by the requisition documents and if there is material before the detaining authority to indicate that the goods are being imported in attempt to evade assessment of payment of tax'.

The decision was also followed in the case of Data Discs Private Limited Vs. Commissioner of Sales Tax reported in 1998 U.P. Tax Cases page-598. Learned counsel for the applicant has placed reliance on the judgment of Allahabad High Court in the case of M/s Wimco limited Vs. The Commissioner Sales Tax U.P. decided on 28-3-2003. In the aforesaid case the Court has followed the decision of M/s Oriental Carbon Limited (supra) and Chain Sudh Vanaspati case (supra). In the present case the Tribunal has recorded a finding of fact that there was no loss of revenue to the department and further there was no intention to evade

Tax the order of penalty under section 15-A (1)(O) can not be sustained.

For the reasons recorded above both the revisions are allowed. Order of Tribunal dated 5-6-1998 is set aside and penalty imposed under section 15-A (1)(O) is cancelled.

(M.M. Ghildiyal)

Dt. 23.9.2003